Supreme Court, U.S.
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No. 96-113

IN THE

Supreme Court of the United States

October Term, 1996

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM,

Petitioner,

v.

REIMER & KOGER ASSOCIATES, INC., RONALD REIMER, KENNETH H. KOGER, CLIFFORD W. SHINSKI, BRENT MESSICK, ROBERT CREW, SHERMAN DREISESZUN, LELAND GERHART, I. I. OZAR, RAYMOND GIFFORD, HARRY S. JONAS, RANDALL M. NAY, FRANK SEBREE, TONY SALAZAR, PHILIP PISTILLI, MICHAEL K. RUSSELL, GAGE & TUCKER, PEAT, MARWICK, MITCHELL & CO., KPMG PEAT MARWICK, ROBERT SPENCE, THOMAS S. MORGAN, co-executor of the estate of FRANK S. MORGAN, MARILYN J, co-executor of the estate of FRANK S. MORGAN, ISABEL A. KIENE, executrix of the estate of RALPH E. KIENE, SHOOK, HARDY & BACON, C. PATRICK McLARNEY, substituted for SHOOK HARDY law firm, BLACKWELL SANDERS MATHENY WEARY & LOMBARDI, L.C.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY TO BRIEFS IN OPPOSITION

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REPLY TO BRIEFS IN OPPOSITION

KPERS hereby replies to the arguments raised by respondents in support of the decision below and to respondents' claim that KPERS' petition should be denied on mootness grounds.

1. On the first question presented, whether 28 U.S.C. § 1367 supplemental jurisdiction decisions involve issues of subject-matter jurisdiction, or instead are completely insulated from review even in the face of an abuse of discretion, respondents' efforts to deny the existence of any conflict in the circuits are wholly unavailing.

The Eighth Circuit has held that under Section 1367 it is totally irrelevant — and *unreviewable* — whether a "district court abused its discretion in retaining the case" after the initial basis for federal jurisdiction is lost. Pet. App. 7a. It has also noted that the law of the Seventh and D.C. Circuits is in "conflict with" and "inconsistent with" its decision and its own interpretation of this Court's precedents. For example, the Seventh Circuit has explicitly held that, where the federal claim is dismissed before trial, the relevant analysis "is jurisdictional" and "we are obligated to raise it ourselves." *Maguire v. Marquette Univ.*, 814 F.2d 1213, 1218 & n.4 (7th Cir. 1987). Respondents also ignore that this specific holding of *Maguire* was recently adopted by the full D.C. Circuit in *LaShawn A. v. Barry*, 87 F.3d 1389, 1397 n.10 (D.C. Cir. 1996) (en banc).

Thus, the supplemental jurisdictional issue presented here is an important and recurring aspect of federal procedure, and the conflict over it warrants this Court's review. "On the Supreme Court rests the prime responsibility for the proper functioning of the federal judiciary. The grant of certiorari in cases involving federal jurisdiction, practice, and procedure reflects that responsibility." R. Stern, et al., *Supreme Court Practice* § 4.15, at 191-92 (7th ed. 1993) ("Stern"). Thus, the only ground on which to deny certiorari would be if this case were a poor vehicle for addressing the conflict.

On this score, respondents claim that KPERS "attacks dicta only, as it ignores the principal, independent basis for the Eighth Circuit's decision: arising-under jurisdiction under 12 U.S.C. § 1441a." Peat Marwick Opp. 6; *see also* Reimer & Koger Opp. 11 (arguing that supplemental jurisdiction ruling "was purely academic.").

Respondents have it backwards; it is the language *they* emphasize that appears not to be a holding. As indicated by the Eighth Circuit's language immediately preceding the passage quoted

in Peat Marwick Opp. 6, all that can be determined with any certainty is that in discussing the arising-under jurisdiction point, the Eighth Circuit was recounting the fact "that the district court articulated two theories to justify its refusal to remand the case." Pet. App. 6a. The remainder of the paragraph, which respondents claim is a holding by the Eighth Circuit, is consistent with a mere description of *the district court's holding* on this point; the Eighth Circuit does not unambiguously hold against KPERS on this ground. As we have stated, the evident meaning of these few lines of text is that "[t]he Eighth Circuit briefly suggested that this Section 1367(c) issue could be avoided by construing Section 1367 as simply inapplicable in a case like this." Pet. 11 n.10. Indeed, in the rest of its analysis, the Eighth Circuit explicitly "limit[ed] [its] analysis to supplemental jurisdiction." Pet. App. 6a. Respondents' assertion that the passing reference to arising-under jurisdiction is actually the "principal holding" rather than a "brief suggestion," Peat Marwick Opp. 7 n.8, ignores this language setting out a narrow scope of analysis.[1]

In any event, even if the few lines of the Eighth Circuit's decision on the arising-under jurisdiction point constitute a holding, that does not mean that the next two paragraphs in the Eighth Circuit's decision concerning the nature of Section 1367 supplemental jurisdictional rulings (*see* App. 6a-7a), are dicta. At minimum, these two paragraphs, the basis of KPERS' first question presented, constitute an alternative holding. *See, e.g., Woods v. Interstate Realty Co.*, 337 U.S. 535, 5337 (1949) ("where a decision rests on two or more grounds, none can be relegated to the category of obiter dictum"); *United States v. Title Ins. & Trust Co.*, 265 U.S. 472, 486 (1924) (rejecting argument that one ground for decision "should be disregarded, because [of] . . . a second ground for [the

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[1] One opposition claims that in the few lines touching on the arising-under jurisdiction point, "the Eighth Circuit was merely reaffirming its previous decision on the same point." Reimer & Koger Opp. 9; *see also id.* at 10, 13. But the decisions cited do not support this claim; the subject-matter jurisdiction issue was not involved in those narrow interlocutory appeals. Nor is there anything to the claim that we raise an "untimely challenge" on the subject-matter jurisdiction issue because KPERS did not appeal the issue until its first opportunity to appeal as of right, when a preliminary injunction was imposed. *See* Peat Marwick Opp. 9 & n.11.

court's] decision which was broad enough to sustain it independently of the first ground."). This holding should be reviewed, as it will remain the law of the Eighth Circuit, in conflict with the law of other circuits, unless and until this Court grants certiorari on the issue.

Further, and again assuming for purposes of argument that the arising-under jurisdiction theory is actually a holding, there is nothing to respondents' claim that "[t]he petition does not challenge" the holding, so that granting review of KPERS' first question presented "could have no effect on this case." Peat Marwick Opp. 6-7 (footnote omitted). In fact, the petition *does* challenge the arising-under jurisdiction theory, arguing that it can be readily dispensed with as a "minor feature" of the analysis under our second question presented. Pet. 11 n.10. "[E]lementary principles of statutory interpretation," we observed, applied in conjunction with principles of comity, require that the Section 1367(c) framework — addressing the disposition of a case where the initial basis for federal jurisdiction disappears — should control in all such situations. Construing Section 1367(c) as providing the exclusive tool for addressing situations where the original basis of federal jurisdiction has been lost is consistent with its language and would prevent strained constructions of other statutes like the one advocated in this case, under which respondents would vest jurisdiction of a case like this in the federal courts forever, despite the meritless nature of the third-party claims used to hijack the case into federal court to begin with. *Id.*[2]

Of course, we need not demonstrate that this arising-under jurisdiction issue — assuming that it does constitute a holding — is

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[2] It is worth noting, for example, that the RTC removal statute relied on by respondents merely states that *only* a "civil action, suit or proceeding to which the [Resolution Trust Corporation] is a party shall be deemed to arise under the laws of the United States," as to which "district courts shall have original jurisdiction." 12 U.S.C. § 1441a(*l*)(1) (quoted in Reimer & Koger Opp. at 2). The cases cited by respondents concerning this statute (*see* Peat Marwick Opp. 7 n.7) merely support the view that *during the time that the RTC is actually a party* to an action, original jurisdiction exists over the entire action. Once the action becomes one as to which the RTC *is not* a party, the issue becomes whether federal jurisdiction should *continue*. On this issue, 28 U.S.C. § 1367(a) controls, "[e]xcept as . . . expressly provided otherwise by Federal statute" (no express provision for this situation is found in the RTC removal statute), and 28 U.S.C. § 1367(c) provides guidance concerning whether or not supplemental jurisdiction should be declined.

independently certworthy. We need only demonstrate some prospect of prevailing on the issue under our analysis of the second question, so that KPERS has a stake in the grant of certiorari.

2. On the second question, respondents assert that we "improperly seek[] an advisory opinion." Peat Marwick Opp. 11. But a decision by this Court construing Section 1367(c) in light of abstention and other comity principles would in no sense be advisory. Rather, it would bear directly on the question whether the district court abused its discretion in refusing to remand this case and in thereby rewarding respondents for bringing meritless claims against the RTC in order to force the State of Kansas to bring its civil fraud and other claims in federal court. Pet. 13-14. Consistent with respondents' view (*see* Peat Marwick Opp. 12 n.16), we also stated that "we would not expect this Court itself" to perform a plenary analysis in the first instance, and thus we suggested that this Court clarify the relevance of abstention and other comity principles in construing Section 1367(c), and then remand the case. Pet. 15.

Respondents also argue that abstention principles simply "are not relevant" to discretionary decisions about supplemental jurisdiction. Reimer & Koger Opp. 13-14. We submit that the views of Justice Powell, late Solicitor General Lee, and Professor Shapiro, *see* Pet. 15, provide ample room for debate on this point. Finally, and more narrowly, respondents take issue with KPERS' specific analysis of the relevance of *Younger* abstention to this case, *see* Peat Marwick Opp. 11; Reimer & Koger Opp. 14, and they also argue that "exercising supplemental jurisdiction was not an abuse of discretion under the peculiar circumstances of this case." Peat Marwick Opp. 8; *see also id.* at 10. As part of this strategy, they set forth a distorted view of the case that belittles the sovereign interest of the State of Kansas and impugns KPERS' integrity.[3] Such points have

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[3] For example, respondents suggest that KPERS is misrepresenting this litigation as revolving around state-court fraud claims that are traditionally litigated in state court and that the State of Kansas could prosecute criminally, *see* Reimer & Koger Opp. 5; Peat Marwick Opp. 5, even though KPERS' description of the litigation is obviously correct. *Compare* Pet. 4, 14, *with KPERS v. Reimer & Koger Assocs., Inc.*, 4 F.3d 614, 615 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 2132 (1994) (this litigation involves "various allegations of fraud, breach of fiduciary duty,

no bearing on whether certiorari should be granted and are not even relevant to the merits of the issues in this case.

3. Respondents' final argument is that certiorari should be denied on mootness grounds because five days after the petition was filed, the district court — at respondents' urging — replaced the preliminary injunction with a permanent injunction. *See* Reimer & Koger Opp. at 10, 18-19; Peat Marwick Opp. 2 & n.2, 13. We certainly question whether the district court's granting of a request "that . . . the preliminary injunction . . . be made permanent," Reimer & Koger App. 30a — which it did after restating *exactly* the same findings relevant to jurisdictional and other matters that supported the preliminary injunction, *id.* at 31a-32a — creates mootness.

If the case were moot, however, it would appear that the proper remedy would be to vacate what would then be an unreviewable decision below. The established practice, of course, is to vacate any judgment "which has become moot while on its way here or pending our decision on the merits." *United States v. Munsingwear*, 340 U.S. 36, 39 (1950). *See also U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386, 390-93 (1994); 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction 2d* § 3533.10, at 433-34 (1984); *id.* at 324 (Supp. 1996). Respondents suggest that vacatur is appropriate only if this Court would have granted certiorari absent mootness. Peat Marwick Opp. 13 (citing Stern, *supra*, *Supreme Court Practice* § 18.5, at 724). But the controlling *Bonner Mall* decision requires vacatur "when mootness results from unilateral action of the party who prevailed below," 115 S. Ct. at 392, as is the case here given that it was *respondents* who moved for a permanent injunction. Respondents' suggestion that this Court should base any vacatur decision on an assessment of the certworthiness of this case is also foreclosed by *Bonner Mall*, which established "the inappropriateness of disposing of cases, whose merits are beyond judicial power to consider, on the basis of judicial estimates regarding their merits." *Id.* at 393.

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professional negligence, and gross negligence"). Similarly, respondents accuse KPERS of "grossly misleading" this Court about the RTC's post-dismissal lack of interest in a federal forum, Peat Marwick Opp. 5, even though KPERS simply quoted what the RTC's counsel stated for the record. Pet. 6 n.5.

CONCLUSION

For all these reasons, certiorari should be granted.

Respectfully submitted.

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